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Subject Matter.

TABLE OF CASES CITED.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 215.

UNITED SERVICES LIFE INSURANCE COMPANY, a Corporation, *Petitioner,*

v.

EDWARD H. BOYE AND LUCY BAUTZ BOYE, *Respondents.*

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

Statement of the Case.

The Statement of Facts contained in the Petition is deemed by Respondents to be an accurate summary of the pleadings and record, which admittedly contain all of the known facts, and no counter statement is considered necessary.

Summary of the Agreement.

1. No conflict exists between the decision of the United States Court of Appeals for the District of Columbia in this case, and the decisions of the United States Courts of Appeals for the Third and Fifth Circuits as asserted by Petitioner.

2. This case was correctly decided and involves only a determination by the United States Court of Appeals for the District of Columbia of a question of local law, and does not present any federal question of substance or any question of general importance.

Argument.

1. No conflict exists between the decision of the United States Court of Appeals for the District of Columbia in this case, and the decisions of the United States Courts of Appeals for the Third and Fifth Circuits as asserted by Petitioner.

Petitioner asserts and emphasizes as a reason for the granting of the Writ of Certiorari that there is a grave diversity between the decision of the Court below in this case, the decision of the United States Court of Appeals for the Third Circuit in *Barringer* v. *Prudential Insurance Company of America*, 153 F. 2d 224, and that of the Fifth Circuit in *Smith* v. *Massachusetts Mutual Life Insurance Company*, 167 F. 2d 990.

The three decisions are not in conflict and do not involve the same subject matter.

In this case the policy in question did not exclude war risks but did contain an aviation exclusion clause. As the insured met his death as a result of a combat mission the Court below correctly decided that all of the known circumstances pointed to death as a result of enemy action, the accepted risk, rather than to "riding or operating any kind of aircraft", the excluded risk.

No such considerations were involved or before the Third Circuit in the *Barringer* case. In that case no military or war clause appeared in the policy, and the only question was whether the known circumstances of the insured's disappearance and probable death brought the cause of death within the aviation exclusion clause. No enemy action or participation in combat was involved although the opinion

of Judge Kirkpatrick in the District Court (62 F. Supp. 286, 288), which was adopted in its entirety by the *per curiam* ruling on appeal, infers that a different result might have obtained if the death of the insured had resulted from "gunfire of a German submarine".

The situation before the Fifth Circuit in the *Smith* case was entirely different from the other two cases. The action was brought by the insurer seeking a declaratory judgment that its policies had matured by reason of the disappearance of the insured under circumstances which may have brought the cause of death within the aviation clause, and the insurer prevailed in the District Court. The Fifth Circuit reversed upon the theory that the action was premature in that the beneficiary had the right, if she so elected, to await further developments such as the possibility of reappearance of the insured, or further evidence as to the manner of his death. This result obviously has no bearing on either the *Barringer* case or the instant case.

In the light of even this brief analysis of the three decisions, the assertion that a conflict exists which should be resolved by this Court disappears. The cases do not involve the same subject matter, the questions presented to each Court are different, and the decisions do not conflict.

2. This case was correctly decided and involves only a determination by the United States Court of Appeals for the District of Columbia of a question of local law, and does not present any federal question of substance or any question of general importance.

There is no question of general importance involved in the decision in this case. No new rule of law is announced which, in the public interest, should be re-examined by this Court. The decision in this case turned entirely upon the proper construction of this particular policy in the light of the known facts and circumstances, or, more accurately stated, in the absence of proof as to the exact cause of death of the insured.

Only a brief comment is necessary in order to demonstrate that the case has been correctly decided. The complaint alleged the fact of death and claimed the face value of the policy. The answer admitted the fact of death, but as an affirmative defense further alleged that the cause of death, as shown by the two War Department Certificates attached as exhibits to the answer, was an excluded cause within the "Aviation Exclusion" of the policy. All of the known facts and circumstances surrounding the disappearance of the insured are contained in the War Department Certificates. They show no cause of death. The only facts they contain are negative. All they show is that the insured's plane failed to return from its mission, but its disappearance, and the disappearance of its crew, are not accounted for in any way. The Court of Appeals correctly held that the Petitioner had failed to establish the affirmative defense on which it relied, and which it had the burden of establishing. The Court further correctly held that the more probable cause of death was from enemy action as a direct result of participation in combat, a risk which the company accepted under its policy, and was not a result of riding or operating an aircraft within the aviation exclusion.

This case is one of first impression in the District of Columbia. The Court of Appeals was called upon to determine what the local law should be in this situation. It had to choose between the conflicting legal contentions of the parties, and reach a solution under the common law of the District. No federal statute or federal question of substance was involved in this determination.

This Court has frequently recognized that sound judicial policy and administration requires that the determination of local law in the District of Columbia be left to the United States Court of Appeals for the District of Columbia. As illustrative of this policy, in *Fisher* v. *United States,* 328 U. S. 463, 476, this Court (Mr. Justice Reed) said:

> "Where the choice of the Court of Appeals of the District of Columbia in local matters between conflicting legal conclusions seems nicely balanced, we do not interfere. *District of Columbia* v. *Pace*, 320 U. S. 698, 702; *Busby* v. *Electric Utilities Union*, 323 U. S. 72, 74-5."

And in *Del Vecchio* v. *Bowers*, 296 U. S. 280, 284, the following appears:

> "We will not ordinarily review decisions of the United States Court of Appeals, which are based upon statutes so limited, or which declare the common law of the District."

The United States Court of Appeals for the District of Columbia has made a correct determination of the local law in this case. It is respectfully submitted that this Court should not interfere with that determination.

Conclusion.

By reason of all of the foregoing, it is respectfully submitted that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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